# United States Court of Appeals for the Second Circuit



**APPENDIX** 

# 76-6077

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VERMONT LOW INCOME ADVOCACY COUNCIL, INC.,

Plaintiff-Appellants

vs.

JOHN DUNLOP, In his official capacity as Secretary, United States Department of Labor,

Defendant-Appellee

On Appeal from the United States District Court
for the District of Vermont

#### APPENDIX



JOHN A. DOOLEY, III Vermont Legal Aid, Inc. 150 Cherry Street Burlington, Vermont 05401

MICHAEL H. LIPSON Vermont Legal Aid, Inc. Of Counsel

ATTORNEYS FOR PLAINTIFF-APPELLANTS PAGINATION AS IN ORIGINAL COPY

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PLAINTIFFS

VERMONT LOW INCOME ADVOCACY QUINCIL, INC.

vs.

M DUNLOP, JOHN, In his official capacity as Secretary, United States Department of Labor

#### CAUSE

T 5 § 552 USC---to enjoin unlawful withholding of agency records--Privacy Act.

#### ATTORNEYS

Michael H. Lipson, Esq. Vermont Legal Aid, Inc. P. O. Box 562 Burlington, VT 05401 863-2871

U. S. Attorney

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CHECK	DATE	RECEIP	TNUMBER	C.D. NUMBER	CARD	DATE MAILED
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DAT 19	E 75	NR.	PROCEEDINGS
Nov.	1	1.	Filed Complaint.
"	11	•	Issued Summons.
"	"	2.	Filed Motion for Preliminary Injunction. (Plaintiff)
"	"	3.	Filed Plaintiff's Memorandum of Points and Authorities.
11	25	4.	" Summons returned served.
Dec.		5.	
"	11	61	" Plaintiff's Motion for Summary Judgment.
"	"	7.	" Plaintiff's Memorandum of Points and Authorités in Support of
			Motion for Summary Judgment.
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Jan.	13	9.0	" Pltf's Motion for an award of counsel fees and costs, and memorandum of points and authorities.
Feb	.24	10	" Motion of Defendant Dunlop to Dismiss and Opposition to
			Award Attorneys' fees and Memorandum of Points and
!!	2,7	111	" Affidavit of Nicholas J. Laezza.
"	11	1 la 1 lb	" Pith s Affidavit re Atty's fees. " Affidavit of Nicholas J. Laezza. " Affidavit of Sofia perters. Michael H. Lipson, Esq. Atty
			for Plaintiff, Jerome F. O'Neill, Atty. for Gov.'t
11	11		Hearing on Plaintiff's Motion for an Award of Counsel Fees and Costs.
11	17		Opening statements made by Mr. Lipson re: Freedom of Information Act
			and Motion for an Award followed by Mr. O'Neill, followed
			further by Mr. Lipson.
11	11		Ordered Decision reserved.
Mar.	31	12	. Filed Memorandum and Order The plaintiff's motion for an award
			for attorney's fee and costs will be denied and the action
			Mandaged Convergited to attue
Apr.	111	13	Zjudgment on Decision by the Court: Plaintiff's Motion for
			an award of Attorneys fees and cost is denied: Action dismissed
1			Mailed copy to attorneys.
11	30	14	Filed Plaintiff's Notice of Appeal. Mailed copy to Michael H. Lipson.
			U. S. Attorney, Court Reporter, Judge Holden and Clerk, U. S.
	20	15	Court of Appeals for the Second Circuit.
lay	20	15	Transcript of hearing here
11	27	16	" Pltf's Letter dated 12-16-75, which was received by Clerk on 12-17-75.
June	2		Mailed Record on Appeal to Clerk, U. S. Court of Appeals for the
			Second Circuit. Attys. notified.

# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

VERMONT LOW INCOME ADVOCACY COUNCIL, INC., Plaintiff	
vs.	CIVIL ACTION NO. 75-247
JOHN DUNLOP, In his official capacity as Secretary, United States Department of Labor, Defendant	) ) ) ) )

#### COMPLAINT

#### (FREEDOM OF INFORMATION ACT)

#### I. JURISDICTION

5 U.S.C. § 552(a)(4)(B).

## II. FACTS

- 1. Plaintiff [VLIAC] is a non-profit Vermont corporation, organized for the purpose of advocating the rights of low-income unemployed and underemployed citizens of Vermont. Plaintiff was active in attempts during 1974 and 1975 to persuade defendant that certification of foreign labor to pick the Vermont apple harvest is unnecessary and deprives local workers of sorely needed job opportunities;
- 2. Defendant is charged with the responsibility for supervising the administration of the Freedom of Information Act

as it applies to his agency, and has custody of certain agency records involved herein;

3. On August 28, 1975, plaintiff, by its counsel, made a written request to defendant's Boston Regional Office for the following records:

"All records, reports or documents prepared by Department of Labor 'monitors' in connection with onsite evaluations of all Vermont apple growers' efforts to recruit domestic labor to pick the 1975 apple harvest [prepared at any time during the period May-July 1975]."

- 4. By letter dated September 8, 1975, plaintiff's request was denied by the Acting Assistant Regional Director For Manpower, who cited 29 C.F.R. § 70.25 ("intra-agency memoranda") as a basis for the withholding;
- 5. Although required to do so by 29 C.F.R. § 70.49 the denial of plaintiffs' request did not contain any reasons for the denial or explanation of how the stated exemption applied to the matter withheld:
- 6. On September 16, 1975 plaintiff appealed the denial of its request to the Solicitor of Labor pursuant to 29 C.F.R. § 70.50 et seq.;
- 7. By letter to plaintiff's counsel dated September 2, 1975 [sic] (received October 7, 1975), the Solicitor notified plaintiff that its appeal could not be determined until October 22, 1975;
- 8. Since plaintiff's counsel had not received the promised decision on its appeal by October 30, 1975, he sent a written demand

to the Solicitor for said records;

- 9. Plaintiff's counsel has not received a decision or said records to date, but did receive a telegram from the Solicitor on November 7, 1975 stating that the "file" had not been "located" and asking for a telephone number;
- 10. Defendant continues to withhold said records without justification and, in accordance with 29 C.F.R. § 70.54, plaintiff has now exhausted its administrative remedies;

#### III. CAUSES OF ACTION

- plaintiff requested are exempt from disclosure under 5 U.S.C. § 552(b) by his failure to determine plaintiff's request within the periods of time prescribed by 5 U.S.C. § 552(a)(6)(A) and (B), and by his failure to reasonably explain the application of 5 U.S.C. § 552(b)(5) to said request as required by 29 C.F.R. § 70.49;
- 12. Defendant is improperly withholding agency records in violation of 5 U.S.C. § 552(a)(3) and will continue to do so to plaintiff's irreparable and immediate injury unless enjoined by this Court.

#### IV. PRAYER FOR RELIEF

WHEREFORE, having stated its Complaint, plaintiff prays that this Honorable Court:

1. Pursuant to 5 U.S.C. § 552(a)(4)(D), give this cause precedence on its docket over all cases, and assign a hearing date on plaintiff's Motion For Preliminary Injunction at the earliest

practicable date;

- 2. Enjoin defendant from withholding the agency records plaintiff requested, and order their production for plaintiff;
- 3. Grant plaintiff costs of this action and attorneys' (fees, pursuant to 5 U.S.C. § 552(a)(4)(E);
- 4. Grant such other and further relief as it may deem proper.

VERMONT LOW INCOME ADVOCACY COUNCIL, INC., Plaintiff

By s/Michael H. Lipson
MICHAEL H. LIPSON
Vermont Legal Aid, Inc.
P.O. Box 562
Burlington, Vermont
(802) 863-2871

#### MOTION FOR PRELIMINARY INJUNCTION

Now comes plaintiff, by its counsel Michael H. Lipson and Vermont Legal Aid, Inc., and moves this Honorable Court for an order preliminarily enjoining defendant Secretary of Labor from:

- 1. withholding the agency records requested by plaintiff
  on August 28, 1975;
- 2. failing or refusing to produce said records for plaintiff forthwith.

DATED: 11/12/75

s/Michael H. Lipson
MICHAEL H. LIPSON
Vermont Legal Aid, Inc.
P.O. Box 562
Burlington, Vermont

ATTORNEYS FOR PLAINTIFF

#### MEMORANDUM OF POINTS AND AUTHORITIES

#### I. BACKGROUND

Congress enacted the Freedom of Information Act, 5 U.S.C. § 552, [hereinafter FOIA] for the purpose of ensuring that arbitrary denial of information to the public by federal administrative agencies would end. The Act was intended to "establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess. (1965). It represented a marked change from its ineffective predecessor, Section 3 of the Administrative Procedure Act of 1940. Section 3 gave agencies descrition to withhold records on the ground that secrecy was required "in the public interest" or that the requested records pertained to the "internal management" of an agency. It limited disclosure to "official" records, and authorized the agency to withhold such documents if it determined that the requesting party was not "properly and directly concerned" with their subject matter. Agencies were also empowered to withhold documents whenever they judged the information should be held "confidential" for "good cause found. Finally, agency withholding of access to records was not subject to court review.

The effect of this series of limitations was to make the disclosure of records a matter of unfettered agency discretion, with the result that "the Administrative Procedure Act had been used more as an excuse for withholding than as a disclosure

statute." (S. REP. No. 813 <u>supra</u> at 3). The Freedom of Information Act stripped the agencies of such latitude. It requires "full agency disclosure unless information is exempt under clearly delineated statutory language." (Id.)

Although as enacted in 1967, the FOIA required agencies to make the records promptly available to any person, 5 U.S.C. § 552(a)(3), public experience under the Act indicated that delays in responding to requests were the rule rather than the exception. The main purpose of the FOIA was to make it "easier" for private citizens to secure information from the government. See Epstein v. Resor, 421 F.2d 950 (9th Cir. 1970). Yet, delaying tactics on the part of agency bureaucracies prevented the effectuation of this purpose. In 1971, the Administrative Conference of the United States made recommendations on "prompt" availability of federal agency information to the public. Its report stated:

To achieve free access to and prompt production of identifiable governmental records in accordance with the terms and policies of the Act, each agency should conform to the statutory policy encouraging disclosure [and] adopt procedural regulations for the expeditious handling of information requests . . .

## U. S. ADMINISTRATIVE CONFERENCE REPORT 52, (July, 1971)

Specifically, the Conference recommended that, "every agency should either comply with or deny request for records within ten working days of its receipt unless additional time is required . . . " for one of five enumerated reasons. Id. at 53-54. Such reasons would justify an extension of deadline for ten additional working days, provided the agency acknowledges the

request in writing within the initial ten day period and notifies the requester that additional time is needed for one of the enumerated reasons. Id. at 53-54. In the case of an agency utilizing an administrative appeals process, failure to act on a request within such an initial or extended time period may be deemed a denial by the requester, and he may petition the officer handling appeals from denials of requests for action. Where the appeals officer does not respond to such a petition within ten days, the requester may treat his request as denied and file an appeal. Id. at 54-56.

It was in response to delay problems that the Congress amended the FOIA in 1974 to mandate specific time periods within which agencies <u>must</u> act on information requests. 5 U.S.C. § 552 (a)(6)(a), (B) and (C), <u>as amended</u>, Pub. L. 93-502, 88 Stat. 1561-1564 (effective March 21, 1975). In addition to that reform, Congress codified court holdings which limited the degree to which agencies could demand specific identification of agency records by requesters, <u>compare</u> 5 U.S.C. § 552(a)(3) (1967) with 5 U.S.C. § 552(a)(3)(A) (1977), and required non-exempt separable portions of records to be provided, <u>see</u> 5 U.S.C. § 552(b) (last sentence) (1974). Finally, to discourage unreasonable failure to disclose information and to encourage resort to the courts for relief from unlawful agency action, Congress provided for awards of court costs and attorneys' fees to prevailing complaints. 5 U.S.C. § 552(a)(4)(E).

#### II. THE MERITS

Plaintiff has requested certain agency records relating to on-site evaluations by defendant's employees of the need for temporary importation of foreign workers to pick the 1975 Vermont apple harvest. The Department of Labor official who first responded to plaintiff's request denied it, claiming the documents to be exempt as "intra-agency memoranda containing data, views and opinions necessary for the functioning of government and the making of informed decisions by its officers (C.F.R. 29 Part 70.25)." The official based his claim, therefore, on 5 U.S.C. § 552(b)(5). In spite of its own regulation requiring a brief statement of reasons for the denial and an explanation of how the exemption applies to the matters requested, 29 C.F.R. § 70.49, the Department's official failed to do so. Plaintiff appealed the denial of its request in accordance with defendant's regulations. Defendant requested and was granted an extension of the twenty-day decision requirement of 29 C.F.R. § 70.54. Thereafter, not having received a decision, plaintiff made a written demand upon the Solicitor for the records, affording an additional nine working days. Since plaintiff did not receive the records or any response meeting the statutory or regulatory requirements, it commenced this action.

The..FOIA exemptions are to be narrowly construed.

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973); Cuneo v. Schlesinger, 484 F.2d 1086 (1973). Moreover, the exemptions are the exclusive justification for withholding information from the

public. See 5 U.S.C. § 552(c). Exemption Five of the FOIA has been authoritatively construed by the United States Supreme Court. E.P.A. v. Mink, 410 U.S. 73 (1973). Prior to that decision, other courts had recognized the danger that government officials would attempt to call practically everything written by them an "intraagency memorandum." For example, in Stokes v. Brennan, 476 F.2d 669, 703 (5th Cir. 1973), the court noted that Exemption Five was "not defined as an exception to compelled disclosure in order to authorize an agency to throw a protective blanket over any type of information it might choose by the expedient of casting it in the form of an internal memorandum." And, as the District of Columbia Circuit warned: " . . . courts must beware of the inevitable temptations of a government litigant to give [the exemption] an expansive interpretation in relation to the particular records in issue." Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

The court's decision in Mink, supra, set forth a dichotomy between agency memoranda on or containing factual matters, and those which contain "deliberative" matters. The purpose of Exemption Five is to protect "'confidential intra-agency advisory opinions . . '". 410 U.S. at 86. The policy supported by the exemption is to avoid a situation in which ". . it would be impossible to have any frank discussion of legal or policy matters in writing . . [and where the] efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.'" 410 U.S. at 87, quoting S. REP. No. 813, p.9.

While "policy" matters may justifiably be withheld from the public the Court in Mink made it clear that "purely factual material appearing in . . [deliberative] documents in a form that is severable without compromising the private remainder of the documents," must be disclosed. 410 U.S. at 91.

The Government must carry the burden of justifying non-disclosure under the FOIA. 5 U.S.C. \$ 552(a)(4)(B). Notwithstanding, plaintiff believes a few words regarding the applicability of Exemption Five to its request are in order. Plaintiff believes the documents, reports or records it requested are "'low-level, routine, factual reports,'" Mink supra, 410 U.S. at 91, and are entirely composed of factual matters upon which defendant based a decision to permit the importation of temporary foreign workers to pick Vermont's apples in 1975. If plaintiff is correct, "... it would be a perversion of the Act to classify the materials as within this provision." Stokes v. Brennan, supra, 476 F.2d at 703. Under such circumstances, this court must order defendant to provide the records. See Sterling Drug, Inc. v. F.T.C., 450 F.2d 698 (D.C. Cir. 1971); American Mail Line v. Gulick, 411 F.2d 696 (D.C. Cir. 1969).

Even if plaintiff is wrong, and the records contain some deliberative materials, defendant cannot withhold the entire document merely because it contain[s] some confidential information." Grumman Aircraft Eng'r Corp. v. Renegotiation Board, 425 F.2d 578, 580 (1970). See also, Ethyl Corp. v. E.P.A., 478 F.2d 47 (4th Cir. 1973); National Cable T.V. Assoc. v. F.C.C., 479 F.2d 183 (D.C. Cir. 1973); Bristol-Myers Co. v. F.T.C., 424 F.2d

935 (D.C. Cir. 1970). Unless he can demonstrate that policy matters are inextricably entwined with the reported facts, defendant must segregate and provide the factual portions. 5 U.S.C. § 552(b). See National Cable T.V. Assoc., supra, at 194. In a recent decision relating, in part, to on-site consultants' reports to a government agency concerning research grant applications, the court recognized this limitation by holding Exemption Five applicable only where the government already had voluntarily disclosed the purely factual material in them. Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C. Cir. 1974).

In addition to the foregoing, plaintiff asserts that defendant should be held estopped from claiming the benefit of Exemption Five or any other exemption at this time. In addition to this court's power to determine the appropriateness of governmental claims to exemptions under the FOIA, it may utilize "any or all of 'the usual weapons in the arsenal of equity'" in dealing with agency intransigence in complying with the Act. Washington Research Project, supra, at 252, quoting Bannercraft Clothing Co. v. Renegotiation Board, 466 F.2d 345, 354 (D.C. Cir. 1972) rev'd on other grds, 415 U.S. 1 (1974). Defendant has failed to comply with the Act and its regulations in two important respects -- he has far exceeded the time limitations contained in 5 U.S.C. § 552(a)(6)(A)(ii), and offered only a bare assertion that an exemption applied, in violation of 29 C.F.R. § 70.49. Although the first of these enables plaintiff to bring this action to the court without awaiting the termination of defendant's FOIA decisional processes, <u>see</u> 5 U.S.C. § 552(a)(6)(C), there will be no remedy for defendant's failure to justify an exemption claim unless this court fashions one. Under these circumstances, plaintiff's suggestion of estoppel may prove a worthwhile path to explore.

Respectfully submitted,

s/Michael H. Lipson
MICHAEL H. LIPSON
Vermont Legal Aid, Inc.
P.O. Box 562
Burlington, Vermont

ATTORNEYS FOR PLAINTIFF

December 16, 1975

Edward J. Trudell, Clerk
U.S. District Court
For the District of Vermont
Federal Building
Burlington, Vermont

Re: VLIAC vs. Dunlop Civil Action No. 75-247

Dear Ed:

Enclosed for filing are PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AFFIDAVIT and MEMORANDUM OF POINTS AND AUTHORITIES. Although I will be out of town on vacation between December 22 and 29, 1975, I would appreciate it if this case might be scheduled for hearing shortly thereafter in accordance with the statutory requirements affording precedence to Freedom of Information Act cases.

Thanks for your cooperation, and happy holidays.

Sincerely,

Michael H. Lipson Deputy Director

MHL/dr Enclosures

cc: George W.F. Cook, Esquire

#### PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Now comes plaintiff, by and through its counsel, Michael H. Lipson, Esquire and Vermont Legal Aid, Inc., and moves pursuant to F.R.C.P. 56(a) that this Court grant summary judgment for the relief requested in its Complaint, filed on November 13, 1975.

In support of its Motion, plaintiff submits the attached Affidavit and Memorandum of Points and Authorities, submitted to this Court with its Complaint and Motion For Preliminary Injunction, and asserts:

- (1) that there is no genuine issue as to any material fact, and
- (2) that plaintiff is entitled to judgment as a matter of law.

DATED: 12/16/75

s/Michael H. Lipson
MICHAEL H. LIPSON
Vermont Legal Aid, Inc.
P.O. Box 562
Burlington, Vermont

ATTORNEYS FOR PLAINTIFF

# PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Now comes Michael H. Lipson, on behalf of plaintiff Vermont Low Income Advocacy Council, Inc., and being first duly sworn on oath states the following:

- 1. In September, 1974 I undertook the representation of plaintiff in connection with various issues concerning the so-called 'offshore labor" program of the Department of Labor, where-by foreign workers were being brought to Vermont annually to pick the apple harvest.
- 2. In connection with that representation, I have made various oral and written requests for information to the Department of Labor;
- 3. I learned in August of 1975 that defendant had sent certain of his representatives (called "monitors") to Vermont hetween May and July, 1975 for the purpose of evaluating and reporting on Vermont apple growers' efforts to recruit domestic labor to pick the 1975 apple harvest, and on the availability of local labor, and that these "monitors' had prepared certain writings on that subject;
- 4. On August 28, 1975, on plaintiff's behalf, I made a written request to defendant's Boston Regional Office for the monitor's reports. My letter is attached hereto as Exhibit Λ;
- 5. By letter dated September 8, 1975 defendant's authorized representative denied the request. The letter of denial is attached hereto as Exhibit B.

- 6. On behalf of plaintiff, I appealed said denial by letter dated September 16, 1975 and received by defendant's Solicitor on September 19, 1975. The letter and Return Receipt are attached hereto as Exhibit C;

  7. I received the letter attached hereto as Exhibit D on October 7, 1975, wherein the defendant's Solicitor requested until October 22, 1975 to determine the appeal;
- 8. I did not receive any determination from defendant's Solicitor by the week ending October 25, 1975 and, on October 30, 1975, sent the letter attached hereto as Exhibit E, demanding the documents;
- 9. On November 7, 1975 I was informed by my secretary that the Solicitor had telegrammed that the "file" had not been received in that office because it had not been "located", that the Solicitor "understood" the file was in the mail to its office that day, and that I should "advise" my telephone number so that the Solicitor might contact me to "discuss";
- 10. I have not received any determination of the appeal or the requested records to date, nor have I received any communication from defendant concerning this matter;
- 11. I believe that the records which were requested from defendant (a) were prepared by low-level agency employees; (b) contain solely factual material relating to local apple harvest labor recruiting and availability; and (c) were utilized by defendant in his decision to permit the importation of foreign workers in Vermont in 1975.

DATED:	MICHAEL H. LIPSON  Wermont Legal Aid, Inc.  P.O. Box 562  Burlington, Vermont	
1975.	Subscribed and sworm to before me thisday of December,	
	NOTARY PUBLIC	
My com	mission expires	

Box 562 Burlington, Vermont

August 28, 1975

Mr. Luis Sepulveda Acting Assistant Manpower Administrator U.S. Department of Labor 1707 J.F.K. Building Boston, Massachusetts

Dear Mr. Sepulveda:

Pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552, as amended, please furnish the following to me within 10 working days of your receipt of this request (see 5 U.S.C. § 552(a)(6)(A)(i)):

All records, reports or documents prepared by Department of Labor "monitors" in connection with ansite evaluations of all Vermont apple growers' efforts to recruit domestic labor to pick the 1975 apple harvest [prepared at any time during the period May-July 1975].

Additionally, I would like to request that fees for services be waived for the following reasons: (1) I am representing a client group, the Vermont Low Income Advocacy Council, Inc., which qualifies for free legal assistance under guidelines approved by the Office of Economic Opportunity; (2) these clients cannot afford to pay the charges for such services; (3) the Vermont Legal Aid, Inc. fiscal year 1975-1976 budget has no funds specially allocated for such services, and to take funds from other areas would impair our ability to effectively represent cligible poor clients and; (4) a significant public interest would be served by providing the services free of charge, vis., the resolution of important public issues concerning employment of domestic workers and wage rates paid to them in the State of Vermont.

Thank you for your attention and cooperation.

Very truly yours,

Michael H. Lipson Deputy Director

cc: Assistant Secretary for Administration and Management A-21

September 8, 1975

Mr. Michael H. Lipson Deputy Director Vermont Legal Aid, Inc. Box 562 Burlington, Vermont

Dear Mr. Lipson:

Your letter dated August 28, 1975, requesting records, reports or documents prepared by Department of Labor monitors on recruitment of domestic labor by apple growers in Vermont, was received in this office on September 3, 1975.

I regret to inform you that the material cannot be furnished to you since it is exempt from the Freedom of Information Act. It is intra-agency memoranda containing data, views, and opinions necessary for the functioning of government and the making of informed decisions by its officers (CFR 29 Part 70.25).

Please, be put on notice that: An applicant whose request for records has been denied may file an appeal within 90 days from the date of the denial stating in writing the grounds for appeal, including any supporting statements or arguments. The appeal shall be addressed to the Solicitor of Labor, Department of Labor, Washington, D.C. 20210. The Solicitor shall review appellant's supporting papers and pass on the appeal. The decision of the Solicitor shall be the final action of the Department of Labor (29 CFR 70.50). Ultimate judicial review is also available pursuant to 5 U.S.C. 552.

Sincerely,

Luis Sepulveda Acting Assistant Regional Director for Manpower

Box 562 Burlington, Vt.

September 16, 1975

Solicitor of Labor Department of Labor 200 Constitution Avenue, N.W. Washington, D.C. 20210

Re: FOIA Appeal

Dear Sir:

Pursuant to the provisions of 5 U.S.C. § 552(a)(6)(A)(ii) and 29 C.F.R. §§ 70.50 et seq., I am appealing the denial of an FOIA request submitted on August 28, 1975 (Exhibit A, attached). The denial letter, dated September 8, 1975, is attached as Exhibit B. Please note that the latter fails to comply with 29 C.F.R. § 70.49 inasmuch as it contains no explanation whatsoever of how the claimed exemption applies to the matter requested.

The grounds for this appeal are, inter alia: (1) the matter requested consists largely of factual material collected by low-level DOL officials in connection with the Secretary's foreign labor certification program (note Mr. Sepulveda's admission that "data" is contained in it); (2) my information is that if any views or opinions are contained in the matter, they are those of growers requesting foreign labor or State Employment Service officials supporting their requests, not of DOL officials; (3) even if opinions are contained in the matter, a long line of decisions including EPA v. Mink, 410 U.S. 73 (1973) require disclosure of the factual portion of such matter unless it is so intertwined with the deliberative portion as to defeat the exemption's purpose.

It is consistent with my experience with Mr. Sepulveda's office that exemption 5 would be utilized here. Despite all the laws and regulations imagninable, there still is a strong tendency on the part of some within government to cast every writing as an "internal memorandum." Needless to say, this practice subverts both the letter and the spirit of FOIA.

Solicitor of Labor September 16, 1975 Page Two

I would appreciate your decision within 20 working days of your receipt of this appeal, as provided in 29 C.F.R. § 70.54.

Very truly yours,

Michael H. Lipson Deputy Director

MHL/dr Enclosures

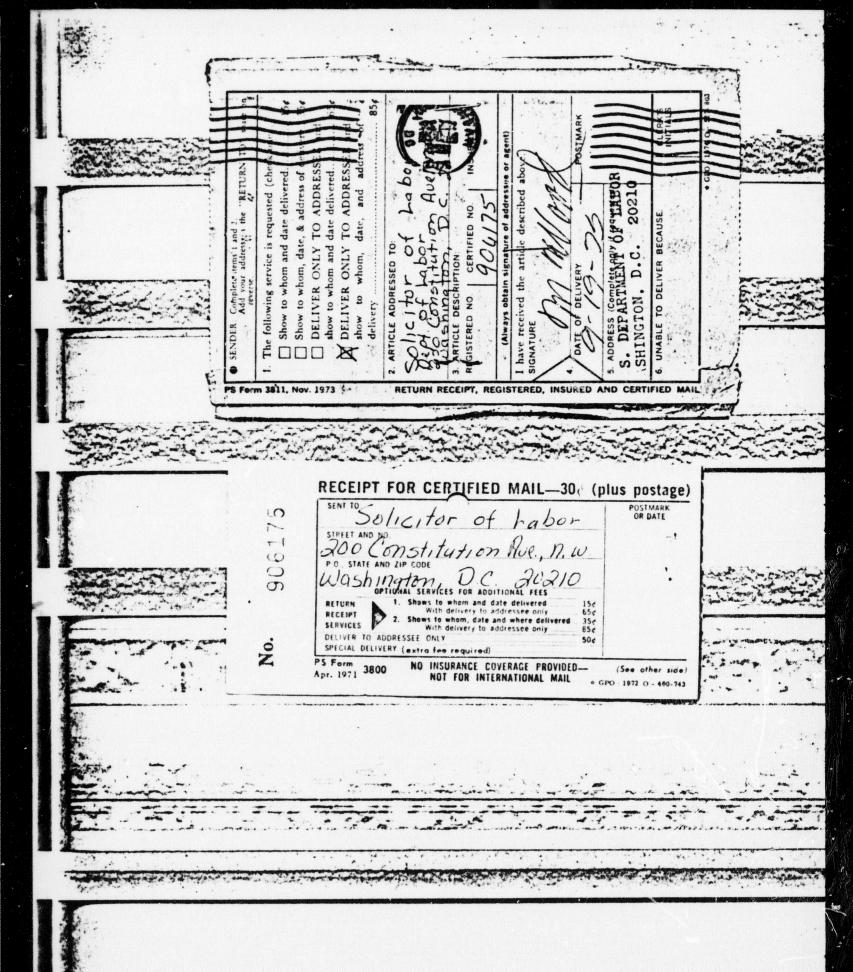


EXHIBIT D

September 2, 1975

Mr. Michael H. Lipson Deputy Director Vermont Legal Aid, Inc. Box 562 Burlington, Vermont

Dear Mr. Lipson:

This is to acknowledge receipt of your letter by this office on September 24, 1975, appealing the decision of the Acting Assistant Regional Director for Manpower, denying release of information from the investigative record pertaining to DOL monitors on recruitment of domestic labor by apple growers in Vermont.

Before a determination can be made in this case, we must obtain the record from the Regional Office. A reply will be mailed from this office on or before October 22, 1975.

Sincerely,

Sofia P. Petters, Administrative Counsel for Legal Services

EXHIBIT E

October 30, 1975

Sofia P. Petters, Attorney Administrative Counsel for Legal Services Office of the Solicitor United States Department of Labor Washington, D.C. 20210

Dear Ms. Petters:

Your letter dated [sic] September 2, 1975 informed me that a decision on my FOIA appeal of September 24, 1975 would be mailed on or before October 22, 1975. I have not yet seen it.

According to 29 C.F.R. § 70.54, I understand that I am now "deemed" to have exhausted administrative remedies with respect to this request. This is to notify you that I intend to commence an action to compel your agency to honor the request unless I am in receipt of the records by November 5, 1975.

Very truly yours,

Michael H. Lipson Deputy Director

MHL:g

# PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

- 1. Plaintiff incorporates by reference herein its Memorandum of Points And Authorities submitted to this Court on November 13, 1975;
- 2. Should defendant assert that the documents requested herein contain decisional or policy-making matters, plaintiff urges this Court to examine those documents in camera. See E.P.A. v. Mink, 410 U.S. 73,93 (1973). See also, Soucie v. David, 448 F.2d 1067, 1079-1080 (D.C. Cir. 1971) ("the court need not Report if the Government describes its relevant features sufficiently to satisfy the court that the claim of privilege is justified.")
- 3. Inasmuch as plaintiff requested the documents in issue almost <u>four monthsago</u>, it respectfully requests that its motion be scheduled for hearing and decided at the earliest practicable time. 5 U.S.C. § 552(a)(4)(D).

DATED:	
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s/Michael H. Lipson
MICHAEL H. LIPSON
Vermont Legal Aid, Inc.
P.O. Box 562
Burlington, Vermont

#### CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MOTION,

AFFIDAVIT and MEMORANDUM were mailed, U.S. postage prepaid, this

day of December, 1975, to George W.F. Cook, Esquire,

United States Attorney for Vermont, Federal Building, Rutland,

Vermont 05701.

s/Michael H. Lipson
MICHAEL H. LIPSON
Vermont Legal Aid, Inc.
ATTORNEYS FOR PLAINTIFF

#### ANSWER

Defendant JOHN DUNLOP, ly and through his attorney, George W.F. Cook, United States Attorney for the District of Vermont, herely answers plaintiff's complaint as follows:

### First Defense

The complaint fails to state a claim upon which relief can be granted.

### Second Defense

The Court is without jurisdiction over the subject matter of this action.

# Third Defense

Defendant DUNLOP is not a proper party to this action.

# Fourth Defense

Plaintiff has failed to name a proper party defendant to this action.

# Fifth Defense

Responding specifically to the numbered paragraphs of the complaint, defendant admits, denies and avers as follows:

I. Denied, and the Court is respectfully refered to the cited statute for the complete and accurate terms thereof.

II. 1. Denied for lack of information or knowledge sufficient to form a belief as to the truth of the averments. 2. This paragraph sets forth conclusions of law and not allegations of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied, except to admit that defendant discharges the obligations and performs the duties of his office. 3. Denied, except to admit that Mr. Luis Sepulveda, acting assistant regional manpower administrator for the Boston regional office Department of Labor, received from plaintiff's counsel a letter dated August 28, 1975 to which the Court is respectfully referred for the complete and accurate terms thereof. 4. Denied, except to admit that Mr. Luis Sepulveda, acting assistant regional director for Manpower for the Boston regional office, Department of Labor, sent a letter dated September 8, 1975 to plaintiff's counsel to which the Court is respectfully referred for the complete and accurate terms thereof. 5. Denied. 6. Denied, except to admit that the solicitor of labor received from plaintiff's counsel a letter dated September 16, 1975 to which the Court is respectfully referred for the complete and accurate terms thereof. 7. Denied, except to admit that Sofia Peters, administrative counsel for legal services sent to plaintiff's counsel on October 2, 1975 a letter dated September 2, 1975 (sic) to which the Court is respectfully referred for the complete and accurate terms thereof. A - 30

8. Denied, except to admit that Sofia Peters, administrative counsel for legal services, received from plaintiff's counsel a letter dated October 30, 1975 to which the Court is respectfully referred for the complete and accurate terms thereof.

9. Denied, except to admit that Sofia Peters, administrative counsel for legal services sent to plaintiff's counsel a telegram dated November 7, 1975 to which the Court is respectfully referred for the complete and accurate terms thereof.

10, 11, 12. These paragraphs set forth conclusions of law and not allegations of fact for which an answer is required, but insofar as an answer may be deemed required, they are denied.

Defendant further denies that plaintiff is entitled to the relief prayed for or to any relief whatsoever.

Any allegations in the complaint not hereinbefore expressly admitted or denied are hereby denied.

WHEREFORE, defendant, having fully answered the complaint, prays that the Court dismiss this action with prejudice and award defendant his costs.

DATED at Rutland, in the District of Vermont, this 16th day of December, 1975.

UNITED STATES OF AMERICA

George W.F. Cook
United States Attorney

By:
Jerome F. O'Neill
Assistant U.S. Attorney

### CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of December, 1975 mailed a copy of the attached Answer to Michael H. Lipson, Esquire, counsel for plaintiff.

s/Jerome F. O'Neill Jerome F. O'Neill Assistant U.S. Attorney

# MOTION FOR AN AWARD OF COUNSEL FEES AND COSTS

Comes now plaintiff, by and through counsel and pursuant to the provisions of 5 U.S.C. § 552(a)(4)(E), moves this Honorable Court for an award of counsel fees and costs herein and requests a hearing on this Motion.

In support of its motion, plaintiff asserts that it has 'substantially prevailed' in this action inasmuch as its counsel received, on or about December 30, 1975, the attached letter from Defendant's Solicitor, and the documents referred to therein, which constituted substantially full compliance with plaintiff's original request for information.

In further support, plaintiff respectfully directs this court's attention to Defendant's Answer herein, filed on or about December 16, 1975, in which Defendant failed to allege any entitlement to an exemption for the requested documents under 5 U.S.C. § 552(b) (10-(9) in defense of this action, see 5 U.S.C. § 552(a) (4)(B), and to the allegations of Plaintiff's Complaint and Affidavit In Support of Motion For Summary Judgment.

s/Michael H. Lipson MICHAEL H. LIPSON

Attorney for Plaintiff

### MEMORANDUM OF POINTS AND AUTHORITIES

- 5 U.S.C. § 552(a)(4)(E).
- 2. Plaintiff filed its Motion For Summary Judgment herein on or about December 17, 1975. As of that time it had not received the requested documents, nor had defendant's Answer been served, although the 30 days for answer provided by 5 U.S.C. § 552(a)(4)(C) had expired. By that time, moreover, Defendant had illegally withheld the requested documents for nearly four (4) months. In this regard, Defendant wholly disregarded the provisions of 5 U.S.C. § 552(a)(6) and of its own regulations, 29 C.F.R. §§ 70.53, 70.54.

Under the pressure of litigation it rendered necessary, Defendant has now furnished all the documents plaintiff requested. See 29 C.F.R. §§ 70.49, 70.53, 70.54. The Freedom of Information Act provides that:

> The Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed. 5 U.S.C. § 552(a)(4)(E).

The terms "substantially prevailed" do not limit the Court's authority to grant counsel fees and costs to cases in which a plaintiff secures a final favorable judgment. Where a plaintiff has succeeded in securing requested documents from the agency while an action is pending, it has no less effectuated the Congressional purposes underlying section 552(a)(4)(E) (to encourage parties to effectuate the "national policy of disclosure of government information ) than the plaintiff who has been granted judgment.

1/S. Rept. 9 584, 93d Cong., 2d Sess. (May 16, 1974, at 18.)

Moreover, the plaintiff who finally convinces the agency to comply with its requests without proceedings before the Court acts in the furtherance of judicial economy. Such a plaintiff should be compensated for its efforts. Finally, interpretations of other, similar statutory fee provisions hold that, where the fee provision was designed to encourage individuals injured to seek judicial review, fees should be granted to prevailing public interest plaintiffs absent exceptional circumstances, see e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) cited in Northcross v. Memphis Board of Education, 412 U.S. 427 (1973); Alyeska Pipeline Service, Inc. v. Wilderness Society, 95 S. Ct. 1612, 1624 (1975), and the legislative history of the Freedom of Information Act's attorney fees provision makes it clear that Congress considered citizen plaintiffs to be "private attorneys general. As the Senate Report states: Generally, if a complainant has been successful in providing that a government

Generally, if a complainant has been successful in providing that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating on important public policy. In such cases it would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fees to make the government comply with the law. 2/

DATED: January 12, 1976

Respectfully submitted,

s/Michael H. Lipson MICHAEL H. LIPSON Vermont Legal Aid, Inc. Attorney for Plaintiff

2/S. Rept. 93-584, 93dCong., 2d Sess. (May 16, 1974) p. 19. See also H. Rept. 93-876, 93d Cong., 2d Sess. (March 5, 1974) pp. 6-7.

December 22, 1975

Mr. Michael H. Lipson Deputy Director Vermont Legal Aid, Inc. P.O. Box 562 Burlington, Vermont

Dear Lipson:

This is in response to your appeal under the Freedom of Information Act from the denial by Luis Sepulveda, Acting Assistant Regional Director, Manpower Administration, Boston, Massachusetts, of "all records, reports or documents prepared by Department of Labor 'monitors' in connection with onsite evaluations of all Vermont apple growers' efforts to recruit domestic labor to pick the 1975 apple harvest (prepared at any time during the period May-July, 1975)."

I have reviewed the record in this matter and have concluded that the requested information may be made available to you except for that information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Exemption 6 of the Freedom of Information Act and section 70.26 of the Departmental regulations (29 CFR 70.26) recognize the need to protect such information. Relevant case law indicates that a privacy interest extends not only to the type of information people do not generally make public, but also indicates information about an individual over which he could reasonably assert an option to withhold from the public at large because of its intimacy of possible adverse effects upon himself or his family. Congress explicitly recognized the need for Federal agencies to protect the privacy interests of individuals when it enacted the Privacy Act of 1974, and therefore extreme caution must be employed to protect such privacy rights.

The record in this case is being made available to you with the exception of the indicated deletions. To the extent that I have done so, I am pleased to be able to grant your request. In addition, I have waived the normal fee of 10 cents per page.

I am aware that this case is currently in litigation, however I have proceeded to make this determination in accordance with Department of Justice guidelines. Furthermore, I am forwarding a copy of this decision to the Department of Justice and the United States Attorney for the District of Vermont.

Sincerely,

William J. Kilberg Solicitor of Labor

Enclosure

#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION and MEMORANDUM was mailed, postage prepaid, this 12th day of January, 1976, to the following counsel for defendant:

Jerome F. O'Neill, Esquire Assistant United States Attorney Federal Building Rutland, Vermont 05701

s/Michael H. Lipson
MICHAEL H. LIPSON
Vermont Legal Aid, Inc.

### AFFIDAVIT

Now comes Michael H. Lipson, Esquire, Vermont Legal Aid, Inc., Attorney for Plaintiff, being first duly sworn on oath, and in support of Plaintiff's Motion For An Award Of Counsel Fees And Costs states the following:

- 1. Filing fees in the amount of Fifteen Dollars (\$15.00) have been advanced from the litigation budget of Vermont Legal Aid, Inc. to plaintiff for the filing of this action;
- 2. United States Marshal's service and travel fees in the amount of Twenty-five Dollars and Eighty Cents (\$25.80) have been advanced from the litigation budget of Vermont Legal Aid, Inc. to plaintiff, for service of process in this action;
- 3. As plaintiff's counsel, I expended the following hours or portions thereof in the preparation of pleadings, motions and memoranda in the prosecution of this action:

On November 8, 1975, in preparation and redrafting of the Complaint	Ho:	urs
On November 10 and 11, 1975, in research and preparation of the Motion For Preliminary Injunction, and Memorandum in support thereof	• 6	
On December 13, 1975, in preparation of the Motion For Summary Judgment, and research and preparation of the Memorandum in support thereof	.2	3/4
On January 10, 1976, in preparation of the Motion For An Award Of Counsel Fees And Costs, and research and preparation of the Memorandum		
in support thereof	1	7/7

On various dates, telephone calls with defendant's counsel or employ-

- trict Court For the District of Columbia) on November 4, 1969. Over the past six and one half years, I have served as a law clerk to an appellate court judge in the District of Columbia (D.C.); as a stafi attorney with a legal services program in D.C.; as a practicing graduate fellow with a public interest law firm funded by the Ford Foundation, in D.C.; as a Federal Trade Commission trial attorney; and, since September of 1974, I have been the Deputy Director of Vermont Legal Aid, Inc.;
- 5. On the basis of information derived from other counsel in this area of the State of Vermont whose experience at the bar is comparable to my own, I am informed that a reasonable hourly fee for services in litigation of this nature would be thirty-five or forty dollars per hour.
- 6. Any fees this Court might award me will be deposited to the operating accounts of Vermont Legal Aid, Inc., inasmuch as I am personally barred by law from taking fees.

Dated at Burlington, Vermont, this \_\_\_day of February, 1976.

s/Michael H. Lipson MICHAEL H. LIPSON Vermont Legal Aid, Inc. P.O. Box 562 Burlington, Vermont

Subscribed and sworn to before me this day of February, 1976.

MOTION OF DEFENDANT DUNLOP TO DISMISS and OPPOSITION TO AWARD OF ATTORNEYS' FEES and MEMORANDUM OF POINTS AND AUTHORITIES

### Preliminary Statement

On November 13, 1975 plaintiff filed this action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking to obtain records prepared by the Department of Labor monitors during the period May-July, 1975 on recruitment of domestic labor by apple growers in Vermont. Complaint 13. On December 16, 1975 defendant filed an answer. By letter dated December 16, plaintiff forwarded to the Clerk of the Court a Motion for Summary Judgment for filing with the Court. On January 13, 1976 plaintiff withdrew the Motion for Summary Judgment and filed a motion for an Award of Counsel Fees and Costs Pursuant to 5 U.S.C. § 552 (a)(4)(E). Defendant Dunlop now moves to dismiss the complaint pursuant to Rules 12(b)(1) and 12(h) of the Federal Rules of Civil Procedure on the ground that this action is moot and opposes plaintiff's Motion for Award of Attorney's Fees. Basis for this motion and opposition are as follows:

### I. Facts

By letter dated August 28, 1975 Mr. Michael H. Lipson,
Deputy Director of Vermont Legal Aid, Inc., and counsel for plaintiff, directed a letter to Luis Sepulveda requesting pursuant to
the FOIA:

All records, reports or documents prepared by the Department of Labor "monitors" in connection with the on-site evaluations of all Vermont apple growers' efforts to recruit domestic labor to pick the 1975 apple harvest [prepared at any time during (sic) the period May-June, 1975].

Affidavit of Sofia Petters [hereinafter referred to as "Petters Affidavit"], Exhibit A. By letter dated September 8, 1975 Mr.

Supulveda denied the plaintiff's FOIA request on the ground that the requested information consisted of internal memoranda excepted from compelled disclosure by virtue of Exemption 5 of the FOIA, 5

U.S.C. § 552(b)(5). Id., Exhibit B. Plaintiff appealed the decision of Mr. Supulveda to the Solicitor of Labor by letter dated September 16, 1975. Id., Exhibit C. By letter of October 2, 1975 (erroneously dated September 2, 1975), receipt of plaintiff's appeal was acknowledged. Plaintiff was notified that additional time would be required to act on its appeal because of the necessity of obtaining the requested records from the Regional Office. Id., Exhibit D. The file related to plaintiff's appeal was requested by telephone from the Regional Office on October 3, 1975 Petters Affidavit, 42.d.

In response to the Office of the Solicitor's request for the transmittax of documents, Nicholas J. Liezza, an attorney in the Regional Solicitor's Office immediately obtained the pertinent records and within the day mailed copies to the Office of the Solicitor in Washington, D.C. See Affidavit of Nicholas J. Liezza [hereinafter referred to as "Liezza Affidavit"]. Apparently the relevant records were lost in transit to the national office. By telegram transmitted on November 6, 1975, plaintiff was advised that

the lile had not been received from the Regional Office. Petters Affidavit, Exhibit E. On November 6, 1975 certain materials thought to be relevant to plaintiff's FOIA request were forwarded to Washington from the Boston Regional Office. It was subsequently learned for the first time that the materials forwarded to Washington did not cover the period from May-July, 1975 which was the subject of plaintiff's request, but were for the period of September-October, 1975. Id. at ¶2.g. The correct records were forwarded to Washington on December 9, 1975. On the day after their receipt, December 12, 1975, an informal decision was made to grant plaintiff's appeal with the exception of minor deletions to protect personal privacy. Plaintiff was notified by telephone on December 16, 1975 of the decision to make available the requested documents. Id. at ¶2.h. A letter formally granting the appeal was mailed on December 22, 1975. Id. at 72.1. By letter of January 12, 1976 plaintiff withdrew its Motion for Summary Judgment "[i]nasmuch as defendant has furnished the information demanded in our original complaint . . . . " (Emphasis in original).

## II. This Action Should be Dismissed as Moot.

As plaintiff's letter of January 12, 1976 withdrawing its Motion for Summary Judgment reflects, plaintiff has been "furnished the information demanded" in its complaint. Petters Affidavit, Exhibit J. Since compelled release of the requested records is the only relief sought by the Complaint, defendant's action involuntarily making this information available to plaintiff has mooted this action.

In suits such as the present one, filed pursuant to the FOIA, the Court has subject-matter jurisdiction only where the documents sought have been "withheld." 5 U.S.C. § 552(a)(4)(B). Since the documents sought here have been released, the action should be dismissed. In other words, "[t]he only relief sought by appellant in this lawsuit is compelled disclosure of this document. Since appellant has been provided with the document, there is no longer any matter in controversy before this Court." Misegades & Douglas v. Schuyler, 456 F.2d 255, 256 (4th Cir. 1972); accord, Ackerly v. Ley, 420 F.2d 1336, 1340 (D.C. Cir. 1969) ("in any event, we think the lawsuit has lost its substance as to this item, since the only specific relief appellant seeks is compelled disclosure and that has been rendered moot by the disclosure in this instance which has now actually been made.") Accordingly, defendant's Motion to Dismiss should be granted.

III. Plaintiff is not Entitled to an Award of Attorney's Fees And Costs.

Although plaintiff has in essence conceded that there is presently no controversy before the Court for resolution, they nevertheless seek an award for attorney's fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E). That provision provides that:

The Court may assess against the United States reasonable attorney's fees and other litigation costs reasonably incurred in any case under the section in which the complainant has substantially prevailed.

In the United States a litigant is ordinarily not entitled

to collect a reasonable attorney's fee in civil actions, absent a statute specifically providing for the recovery of attorney's fees. Consequently, in order to obtain an award of attorney's fees, plaintiff must bring himself within the express terms of subsection 552(a)(4)(E). Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240,247, 262 (1975). Plaintiff maintains that it has "substantially prevailed" within the meaning of the provisions simply because it secured the documents requested from plaintiff while this action was pending. Memorandum of Points and Authorities in Support of Plaintiff's Motion For An Award and Award of Counsel Fees And Costs. Plaintiff's contention reflects an erroneous construction of subsection 552(a)(4)(A). A plaintiff has not "substantially prevailed" where, as here, the Government voluntarily determines to release documents requested pursuant to the Freedom of Information Act.

By its terms, the FOIA, as quoted above, precludes an award of fees and costs unless the plaintiff has "substantially prevailed." Whatever the meaning of the statutory language in other contexts, it clearly does not apply to permit an award of attorney's fees where the Government voluntarily releases the documents, thus withdrawing the issue from judicial consideration of whether documents

I/"Under this scheme of things, it is apparent that the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." Alyeska Pipeline Co. v. Wilderness Society, supra, at 262.

have been improperly withheld. The House version of this provision provided for an award of attorney's fees and other litigation costs in cases where the Government had "not prevailed." See H. Rep. No. 93-876, 93d Cong. 2d Sess., T.p 8. Subsection 552(a)(4) (E) as passed was modeled on the Senate version of the provision applying to cases in which the complainant had "substantially prevailed." The Senate amendment contained certain criteria for consideration by the Court in making such awards. These were eliminated in conference. The conferees, however, made clear that by "eliminating these criteria" they did "not intend to make the award of attorney's fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria." Conference report, H. Rep. No. 93-1380, 93d Cong., 2d Sess. pp 8-9. One of the criteria expressly recognized is "whether the Government's withholding of the records sought had 'a reasonable basis in law.'" Id. (Emphasis added). The reasonable inference from the legislative history is that an award of attorney's fees is not appropriate where the court has not exercised its limited jurisdiction under the FOIA to order the production of the records "improperly withhold from the complainant." 5 U.S.C. § 552(a)(4)(B). In other words, plaintiff must show that he has "substantially prevailed" in court.

Other statutes which provide for an award of attorney's fees or costs to a 'prevailing party' have been given a similar construction. 'Generally a prevailing party is the party in whose favor judgment is rendered by the District Court." Mobile Power Enterprises, Inc. v. Power Vac, Inc., 496 F.2d 1311, 1312 (10th

Cir. 1974). See also S.A. Hirsh Mfg. Co. v. Childs, 157 F. Supp.

183 (W.D. Pa. 1957); Nash v. Raun, 67 F. Supp. 212 (W.D. Pa. 1946);

6 J. Moore, Federal Practice ¶554.70[4]. In Power Vac, Inc., supra, the Court denied an award of attorney's fees where the parties had entered into a binding settlement agreement. The court noted:

"Mobile elected to settle with Power Vac rather than go to court against both co-defendants and by no stretch of the imagination can we see where settlement between plaintiff and one co-defendant transforms the other co-defendant into a prevailing party." Id. at 1312. See also McCrary v. New York Life Insurance Co., 84 F.2d 790, 795 (8th Cir. 1936) ("[A]n offer of judgment or a tender for the full amount actually due or recovered will ordinarily defeat the right to recover costs. Under such circumstances the plaintiff cannot be said to be the prevailing party.")

A plaintiff is not a "prevailing" party where the controversy has become most prior to final decision. Thus, the Supreme Court in Brownlow v. Schwartz, 261 U.S. 216, 218-19 (1923) ordered a case dismissed 'without costs, because the controversy involved has become most and, therefore, is no longer a subject appropriate

<sup>2/</sup>The legislative history is replete with language that suggests that a court should not award fees and costs unless "a complainant has been successful in proving that a government official has wrongfully withheld the information . . . " S. Rep. No. 93-854, 93d Cong., 2nd Sess., p. 19. For instance, in construing the criterion relating to the sufficiency of the government's withholding of records, the Senate Report states:

Finally, under the fourth criterion a court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requestor.

for judicial action." See also Larkin v. McCann, 368 F. Supp.

1352, 1354 (E.D. Wis. 1974) (costs not awarded where action dismissed as moot). Finally, in the case of Mello v. Secretary of H.E.W., 8 EED 19620, p. 56-57 (Aug. 1974), the Court denied an award of attorney's fees in circumstances similar to those presented here. The application for award of attorney's fees in Mello took place after the court had ordered remand of the proceedings (involving alleged discrimination against an individual) to the Government agency involved for further proceedings. The relief sought was ultimately granted by the agency administratively.

Mello should be followed here since the relief granted plaintiff, the release of documents, eminated exclusively from the natural accumulation of the administrative process. Although the documents sought by plaintiff were denied initially at the lower administrative level, they were eventually released as a consequence of the appeal filed by the plaintiff. The delay in responding to plaintiff's appeal was occasioned by the loss of documents in the mail and an administrative error which resulted in the wrong documents being forwarded to Washington for consideration. As soon

<sup>3/</sup>Indeed, if this Court grants defendant's motion to dismiss, plaintiff will be precluded from contending that it has substantially prevailed. See Williams v. General Foods Corp., 492 F.2d 399, 408 (7th Cir. 1974), where the Seventh Circuit rejected the contention that the "scope of the term 'aprevailing party' was extended beyond a courtroom context to include actual effect on corporate policy." Williams limited "a discretionary award of fees to those parties who are successful in court." 492 F.2d at 408.

as the error was discovered and the correct documents received, plaintiff was notified that the documents would be made available with very minor excisions. Plaintiff indicated its satisfaction with this result by withdrawing its Motion for Summary Judgment. Thus, there is now no matter of controversy between the parties and therefore no issues to be decided by this Court. In view of these circumstances, it cannot be said that the plaintiff has "substantially prevailed" in this litigation within the meaning of 5 U.S.C. § 552(a)(4)(E). For this reason, plaintiff is not entitled to an award of attorney's fees and costs.

Even if the Court were to determine that plaintiff had "substantially prevailed" plaintiff is not entitled to an award of attorney's fees until he has submitted a sworn statement detailing the services performed in a manner capable of examination by the Court and counsel. See Banks v. Seaboard Coastline Railroad Co, 360 F. Supp. 1372, 1375 (N.D. Ga. 1973). "Plaintiff has the burden of proving his entitlement to an award of attorney's fees just as he would bear the burden of proving a claim for any other money judgment." Johnson v. Georgia Highway Express, Inc., 448 F.2d 714, 720 (5th Cir. 1974). Consequently, absent specific evidence on this point, the Court should not make an award of fees even if the plaintiff has 'prevailed," which it has not.

### CONCLUSION

For the above stated reasons defendant asks that this Court grant the Motion to Dismiss and deny the Motion for Award of Attorney's Fees and Costs.

Respectfully submitted,

JOHN T. DUNLOP

George W.F. Cook United States Attorney

By:
 Jerome F. O'Neill
 Assistant U.S. Attorney

February 25, 1976

### CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of February, 1976 mailed a copy of the attached Motion of Defendant Dunlop to Dismiss and Opposition to Award of Attorney's Fees and Memorandum of Points and Authorities to Michael H. Lipson, Esquire, counsel for plaintiff.

s/Jerome F. O'Neill Jerome F. O'Neill Assistant U.S. Attorney

### AFFIDAVIT

COMMONWEALTH OF MASSACHUSETTS:

SS

COUNTY OF SUFFOLK

February 4, 1976

I, Nicholas J. Laezza, Attorney, Regional Solicitor's Office, United States Department of Labor, Boston Massachusetts, being duly sworn, depose and state

At some time during the period October 3, 1975 and November 11, 1975 - the specific date I cannot at this time recall - I received at my office in Boston an oral request by telephone from my national office in Washington, D.C., to transmit by mail to that location certain Employment and Training Administrative records pertinent to the Freedom of Information Act appeal of one Michael H. Lipson of Vermont Legal Aid, Inc. (Vermont Low Income Advocacy Council, Inc.) which was then pending before the Solicitor of Labor in Washington, D.C.

In response to that request I immediately obtained the pertinent records and within the day mailed copies of same to the Solicitor's Office in Washington, D.C.

I have no specific knowledge of a delay, if any, that may have resulted from postal or other problems occurring subsequent to the time I caused the aforesaid records to be deposited in the United States Mail at Boston, Massachusetts.

s/Nicholas J. Laezza

Sworn and subscribed before me this 4th day of February, 1976.

s/Mary G. Riley Notary Public

My Commission expires June 5, 1981

### AFFIDAVIT

- I, SOFIA P. PETTERS, being first duly sworn, depose and say:
- 1. I am the Counsel for Administrative Procedures, Division of Legislatian and Legal Counsel, Office of the Solicitor, United States department of Labor; and I have held that position since March, 1975. As Counsel for Administrative Procedures, I am charged by the Solicitor of Labor with the responsibility for making recommendations for the disposition of appeals under the Freedom of Information Act to the Solicitor of Labor who has the final administrative authority in the Department of Labor for granting or denying such appeals. The statements made in this affidavit are based upon my personal knowledge and upon information available to me in my official capacity.
  - 2. I am familiar with the procedures of the Department of Labor for the administrative handling of appeals under the Freedom of Information Act; and specifically, the plaintiff's appeal from the denial of Luis Sepulveda, Acting Assistant Regional Director for the Manpower Administration, (recently redesignated as the Employment Training Administration), Boston, Massachusetts (hereinafter referred to as ETA.), for certain records in the possession of ETA concerning the efforts of apple growers in the State of Vermont to recruit a local labor force to harvest the 1975 apple crop.

The following is a chronology of the events in this case:

a. By letter dated August 28, 1975, plaintiff requested "all records, reports or documents prepared by Department of Labor 'monitors' in connection with onsite evaluations of all Vermont

apple growers' efforts to recruit domestic labor to pick the 1975 apple harvest prepared at any time during the period May-July 1975. A copy of the letter of August 28, 1975 is attached hereto as Exhibit A.

- b. By letter dated September 8, 1975, Luis Sepulveda,
  Acting Assistant Regional Director for ETA denied the plaintiff's
  request asserting that the requested information consisted of
  internal memoranda reflecting the views and opinions of agency
  staff members and consequently exempt from disclosure by virtue
  of exemption 5 of the Freedom of Information Act. Plaintiff was
  advised of the right to appeal the decision to the Solicitor of
  Labor in accordance with Departmental regulations at 29 CFR 70.50.
  The letter of September 8, 1975 is attached hereto as Exhibit B.
- c. By letter dated September 16, 1975, plaintiff appealed the decision of Luis Sepulveda to the Solicitor of Labor in accordance with the Department's regulations. The letter of September 16, 1975 is attached hereto as Exhibit C.
- d. By letter dated September 2, 1975, I acknowledged receipt of plaintiff's appeal. (The letter is misdated. The correct date of October 2, 1975.) The file which was the subject of the appeal was requested by telephone from the regional office on October 3, 1975. The letter of September 2, 1975 (sic) is attached hereto as Exhibit D.
- e. By letter dated October 30, 1975, plaintiff inquired as to the status of his appeal and indicated that he would file suit unless he was in receipt, of the requested documents by November 5, 1975. The letter was received by me on November 5, 1975.

The letter of October 30, 1975 is attached hereto as Exhibit E. f. By telegram transmitted on November 6, 1975, plaintiff was advised that the file had not been received from the regional office. Plaintiff was requested to furnish a telephone number where he could be reached for the purpose of discussing the situation with him. The telegram of November 6, 1975 is attached hereto as Exhibit F. g. By memorandum dated November 6, 1975 from Nicholas J. Laezza, Boston, Massachusetts, certain materials were forwarded to me, which materials were received on November 10, 1975. The materials transmitted did not cover the period from May-July 1975 which was the subject of the request, but were for the period of September-October 1975. The memorandum of November 6, 1975, is

attached hereto as Exhibit G. h. On December 9, 1975, the correct record was trans-

mitted to Washington, D.C. This material was received on December 11, 1975 and an informal decision to grant the appeal except for minor deletions was made on December 12, 1975. On or about December 16, 1975, plaintiff was notified by telephone of the decision to grant the appeal. A copy of a memorandum evidencing the decision is attached hereto as Exhibit H.

- i. By letter dated December 22, 1975, the appeal was granted officially with minor deletions and the material was transmitted to the plaintiff. The letter of December 22, 1975 is attached hereto as Exhibit I.
- j. By letter dated January 12, 1976 to Edward J. Trudell, Clerk, United States District Court for Vermont, plaintiff acknow-

ledged receipt of the requested documents. The letter of January 12, 1976, is attached hereto as Exhibit J.

The procedure for responding to the plaintiff's request was carried out as expeditiously as possible under the circumstances. My staff, consisting of two attorneys and myself have the Department's primary responsibility for administering the Freedom of Information Act. This responsibility includes training courses for Departmental personnel, the development of legal opinions interpreting the Act and the cases thereunder, giving advice and assistance on a daily basis to program officials and Regional Solicitors, developing administrative procedures for uniform applicability under the Act, clearing administrative instructions, reviewing actions taken by Disclosure Officials on initial requests, and handling administrative appeals and any subsequent litigation. In performing these services, training alone for the Freedom of Information and for the Privacy Act for which I also act as Counsel, required my abscence from the office approximately 30 percent of the time during the pendancy of the plaintiff's appeal. In my absence, members of my staff were required to fulfill those duties which I would otherwise carry out. The situation was acute during the time in question because of the substantial additional burden occasioned by the Privacy Act which became effective on September 27, 1975. Congress did not appropriate funds to agencies for the administration of either the Freedom of Information Act or the Privacy Act and, further, did not approve an increase in staffing to handle the additional workload. While it is the Department's policy to make every effort to meet the stringent

limits in the Act, this Department, like many others, must do the best it can with the limited staff available.

4. Upon the receipt of any appeal by the Solicitor of Labor, an acknowledgment is transmitted to the appellant as soon as practicable and the record is requested by telephone from the appropriate office. This procedure was followed in the instant case. However, the record had not been received as of November 5. 1975 and plaintiff was so notified. A record was received on November 10, 1975. Due to my absence from the office for conferences in Florida during the week of November 17, 1975 and for the reasons stated in paragraph 3 above, I was unable to direct my full attention to this matter until the week of November 24, 1975. At that time, it was ascertained that the materials forwarded did not cover the pertinent time period which was the subject of the request and it was indicated to me that there was no such material available. In any case in which I am advised that there was no Federal record which is the subject of a request, it is my practice, before making a final recommendation to the Solicitor, to direct the appropriate agency to conduct an additional search to insure that such records are in fact not in existence. This procedure was followed in the instant case and it was pursuant to this secondary search that the appropriate record was discovered. I was notified as to the existence of the record on December 9, 1975. The materials were received by me on December 11, 1975 and the informal determination to grant the appeal was made on December 12, 1975. This decision was based upon the content of the materials and the applicable provisions of the Act.

s/Sofia P. Petters
Sofia P. Petters

WASHINGTON ) ss.
DISTRICT OF COLUMBIA )

Subscribed and sworn to before me this 27th day of January 1976.

s/Jeanette S. Smithson Notary Public

My commission expires 5/31/79

Box 562 Burlington, Vt.

August 28, 1976

Mr. Luis Sepulveda Acting Assistant Manpower Administrator U.S. Pepartment of Labor 1707 J.F.K. Building Boston, Massachusetts

Dear Mr. Sepulveda:

Pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552, as amended, please furnish the following to me within 10 working days of your receipt of this request (see 5 U.S.C. § 552(a)(6)(A)(1)):

> All records, reports or documents prepared by Department of Labor "monitors" in connection with on-site evaluations of all Vermont apple growers' efforts to recruit domestic labor to pick the 1975 apple harvest [prepared at any time during the period May-July 1975].

Additionally, I would like to request that fees for services be waived for the following reasons: (1) I am representing a client group, the Vermont Low Income Advocacy Council, Inc., which qualifies for free legal assistance under guidelines approved by the Office of Economic Opportunity; (2) these clients cannot afford to pay the charges for such services; (3) the Vermont Legal Aid, Inc. fiscal year 1975-1976 budget has no funds specially allocated for such services, and to take funds from other areas would impair our ability to effectively represent eligible poor clients and; (4) a significant public interest would be served by providing the services free of charge, vis., the resolution of important public issues concerning employment of domestic workers and wage rates paid to them in the State of Vermont.

Thank you for your attention and cooperation.

Very truly yours,

Michael H. Lipson Deputy Director

MHL/dr cc: Assistant Secretary for Administration and Management

Mr. Michael H. Lipson Deputy Director Vermont Legal Aid, Inc. Box 562 Burlington, Vermont

Dear Mr. Lipson:

Your letter dated August 28, 1975, requesting records, reports, or documents prepared by Department of Labor monitors on recruitment of domestic labor by apple growers in Vermont, was received in this office on September 3, 1975.

I regret to inform you that the material cannot be furnished to you since it is exempt from the Freedom of Information Act. It is intra-agency memoranda containing data, views, and opinions necessary for the functioning of government and the making of informed decisions by its officers (CFR 29 Part 70.25).

Please be put on notice that: An applicant whose request for records has been denied may file an appeal within 90 days from the date of the denial stating in writing the grounds for appeal, including any supporting statements or arguments. The appeal shall be addressed to the Solicitor of Labor, Department of Labor, Washington, D.C. 20210. The Solicitor shall review applicant's supporting papers and pass on the appeal. The decision of the Solicitor shall be the final action of the Department of Labor (29 CFR 70.50). Ultimate judicial review is also available pursuant to 5 U.S.C. 552.

Sincerely,

Luis Sepulveda

Acting Assistant Regional Director

for Manpower

Box 562 Burlington, Vt.

September 16, 1976

Solicitor of Labor Department of Labor 200 Constitution Avenue, N.W. Washington, D.C. 20210

Re: FOIA Appeal

Dear Sir:

Pursuant to the provisions of 5 U.S.C. § 552(a)(6)(A)(ii) and 29 C.F.R. §§ 70.50 et seq., I am appealing the denial of an FOIA request submitted on August 28, 1975 (Exhibit A attached). The denial letter, dated September 8, 1975, is attached as Exhibit B. Please note that the latter fails to comply with 29 C.F.R. § 70.49 inasmuch as it contains no explanation whatsoever of how the claimed exemption applies to the matter requested.

The grounds for this appeal are, inter alia: (1) the matter requested consists largely of factual material collected by low-level DOL officials in connection with the Secretary's foreign labor certification program (note Mr. Sepulveda's admission that "data" is contained in it); (2) my information is that if any views or opinions are contained in the matter, they are those of growers requesting foreign labor or State Employment Service officials supporting their requests, not of DOL officials; (3) even if opinions are contained in the matter, a long line of decisions including EPA v. Mink, 410 U.S. 73 (1973) require disclosure of the factual portion of such matter unless it is so intertwined with the deliberative portion as to defeat the exemption's purpose.

It is consistent with my experience with Mr. Sepulveda's office that exemption 5 would be utilized here. Despite all the laws and regulations imaginable, there still is a strong tendency on the part of some within government to cast every writing as an "internal memorandum." Needless to say, this practice subverts both the letter and the spirit of FOIA.

Solicitor of Lator September 16, 1975 Page Two

I would appreciate your decision within 20 working days of your receipt of this appeal, as provided at 29 C.F.R. § 70.54.

Very truly yours,

Michael H. Lipson

Michael H. Lipson Deputy Director

MHL/dr Enclosures September 2, 1975

Mr. Michael H. Lipson Deputy Director Vermont Legal Aid, Inc. Box 562 Burlington, Vermont

Dear Mr. Lipson:

This is to acknowledge receipt of your letter by this office on September 24, 1975, appealing the decision of the Acting Assistant Regional Director for Manpower, denying release of information from the investigative record pertaining to DOL monitors on recruitment of domestic labor by apple growers in Vermont.

Before a determination can be made in this case, we must obtain the record from the Regional Office. A reply will be mailed from this office on or before October 22, 1975.

Sincerely,

Sofia P. Petters, Administrative Counsel for Legal Services

BEST COPY AVAILABLE

EXHIBIT E

Box 562 Burlington, Vt.

Sofia P. Petters, Attorney Administrative Counsel for Legal Services Office of the Solicitor United States Department of Labor Washington, D.C. 20210

### Dear Ms. Petters:

Your letter dated [sic] September 2, 1975 informed me.that a decision on my FOIA appeal of September 24, 1975 would be mailed on or before October 22, 1975. I have not yet seen it.

According to 29 C.F.R. § 70.54, I understand that I am now "deemed" to have exhausted administrative remedies with respect to this request. This is to notify you that I intend to commence an action to compel your agency to honor the request unless I am in receipt of the records by November 5, 1975.

Very truly yours,

Michael H. Lipson
Deputy Director

MHL:g

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#### EXHIBIT H

Rex E. Lee, Esquire
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20330

Dear Mr. Lee:

Enclosed you will find the Litigation Report for the matter of Vermont Low Income Advocacy Council v. John T. Dunlop, Secretary of Labor, U.S.D.C., D. Vermont, No. 75-247. The documents requested by the plaintiff were denied to said party by the Acting Assistant Regional Director for Manpower, Boston, Massachusetts on the basis of exemption 5 of the Freedom of Information Act. Due to difficulty in obtaining the correct records for review on appeal by the Solicitor of Labor, the statutory time limit expired and plaintiff filed this action. The Solicitor has now reviewed the record and has determined that the requested documents were erroneously withheld on the basis of exemption 5 of FOIA. The material is now being prepared for transmittal to the plaintiff with the exception of the deletion of certain information pursuant to exemption 6 of FOIA. It is our belief that the disclosure of such information would constitute a clearly unwarranted invasion of the personal privacy of certain employees.

I hope the enclosed litigation Report provides you with the necessary information to answer plaintiffs complaint. If you should have any further questions, please do not hesitate to call upon me.

Sincerely,

Sofia P. Petters, Counsel for Administrative Legal Services

Enclosures

LLC:RGalgay:btr 12/12/75 N2428, x38121



EXHIBIT I

December 22, 1975

Mr. Michael H. Lipson Deputy Director Vermont Legal Aid, Inc. P.O. Box 562 Burlington, Vermont

Dear Mr. Lipson:

This is in response to your appeal under the Freedom of Information Act from the denial by Luis Sepulveda, Acting Assistant Regional Director, Manpower Administration, Boston, Massachusetts, of "all records, reports or documents prepared by Department of Labor 'monitors' in connection with onsite evaluations of all Vermont apple growers' efforts to recruit domestic labor to pick the 1975 apple harvest (prepared at any time during the period May-July, 1975)."

I have reviewed the record in this matter and have concluded that the requested information may be made available to you except for that information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Exemption 6 of the Freedom of Information Act and section 70.26 of the Department regulations (29 CFR 70.26) recognize the need to protect such information. Relevant case law indicates that a privacy interest extends not only to the type of information people do not generally make public, but also indicates information about an individual over which he could reasonably assert an option to withhold from the public at large because of its intimacy or possible adverse effects upon himself or his family. Congress explicitly recognized the need for Federal agencies to protect the privacy interests of individuals when it enacted the Privacy Act of 1974, and therefore extreme caution must be employed to protect such privacy rights.

The record in this case is being made available to you with the exception of the indicated deletions. To the extent that I have done so, I am pleased to be able to grant your request. In addition, I have waived the normal fee of 10 cents per page.

I am aware that this case is currently in litigation, however I have proceeded to make this determination in accordance with Department of Justice guidelines. Furthermore, I am forwarding a copy of this decision to the Department of Justice of the United States Attorney for the District of Vermont.

Sincerely,

William J. Kilberg Solicitor of Labor

LLC:BGalgay:btr 12/17/75 N2428, x38121

Box 562
Burlington, Vermont

January 12, 1976

Edward J. Trudell, Clerk U.S. District Court for Vermont Federal Building Burlington, Vermont

Re: VLIAC vs. Dunlop Civil Action No. 75-247

Dear Ed:

Enclosed for filing is Plaintiff's Motion For An Award of Counsel Fees and Costs, and Memorandum of Points and Authorities in support thereof. Please take note of Plaintiff's request for a hearing on this Motion.

Inasmuch as Defendant has <u>furnished</u> the <u>information</u> demanded in our complaint, Plaintiff's Motion for Summary Judgment is withdrawn. However, we intend to pursue the matters raised by the enclosed.

Thank you for your cooperation.

Very truly yours,

Michael H. Lipson Deputy Director

MHL/dr Enclosures

cc: Jeromo F. O'Neill, Esquire

### UNITED STATES DISTRICT COURT

### FOR THE

## DISTRICT OF VERMONT

	)			
Vermont Low Income Advocacy Council, Inc., )	)			
vs	) Civil	Action	No.	75-247
John Dunlop, et al.	)			
	)			

Hearing before the Honorable James S. Holden, Chief, U.S. District Judge, For The District of Vermont, at Rutland, Vermont, on Plaintiff's Motion for an Award of Counsel's Fees and Costs, on 27 February 1976.

### APPEARANCES:

MICHAEL H. LIPSON, Esquire Attorney for Plaintiff

THE HON. JEROME F. O'NEILL Assistant United States Attorney

THE COURT: You may call the next case, Mr. Clerk.

(At this point, the Deputy Clerk announced the next case and indicated names of the attorneys and the Preson for the hearing).

THE COURT: Go ahead, Mr. LIPSON.

MR. LIPSON: Thank you, Your Honor. May it Please the Court, I have submitted an affidavit relating to the expenses and time incurred in pursuing this matter on behalf of the plaintiff. In addition to that affidavit I will be glad to, if necessary, take the stand, subject to whatever cross-examination the United States Attorney would care to pursue.

Second, and preliminarily, the United States has moved to dismiss this action and I do not have any objection to the Court granting that motion as long as the plaintiff's motion for an award of counsel fees and costs is disposed of at the same time, on the merits.

The facts which the United States presents in its motion to dismiss are substantially the same as those presented in the affidavit plaintiff filed in support of the motion for summary judgment, with a couple of exceptions.

The main area of exception, and I take strong exception to this, are the descriptions within the affidavits; attached to the Government's Motion, all of which deal with events of which I had absolutely no knowledge, going on at a Government agency some distance away and of which I was never informed. If the Government wishes to present that

kind of information to the Court, then I think it would be appropriate for those witnesses to come so that the plaintiff would have the opportunity to cross-examine them on just how busy they were at that particular time. Particularly Your Honor, the affidavits of Miss PETERS and Mr. LAIAZA seem to suggest that the Government move immediately in response to both my initial request and appeal, administrative appeal of denial of information, the denial of documents under the Act. They do seem to suggest that I was being unreasonable in pressing forward on the administrative appeal and in terms of filing the action at the time that I did. When I received a telegram, Your Honor, from Miss PETERS, I assume in Washington, D.C., and that is attached to the Government's affidavit, the statutory time limits had been substantially exceeded both with respect to the initial request for information and with respect to the administrative appeal, I was flabbergasted by the telegram which asked me for my telephone number, thinking the Government was incapable of finding that out themselves via Information, and in fact, Your Honor, the Regional Office of the Department of Labor which originally reviewed my request for information had spoken to me by telephone a number of times before on information requests and other matters and had the telephone number.

The other item that Mr. O'NEILL's statement of fact does not relate, is that I did not receive the documents actually until December 30th, some time after I was informed

that the documents would be sent and incidentally, at the time I was informed I was given no promise of any date when sent.

Now, getting to the law, the Freedom of Information Act was amended and specifically provides for an award of counsel fees to a prevailing party. It is a statutory mandate. The facts in this case, undisputed on the hasis of the Government's affidavit and on the hasis of the affidavits that we have presented to the Court, that on the matter of my request for information, the Government clearly and plainly violated the statute and their own regulations practically every step of the way.

I did not receive the documents until four months after I had requested them. Furthermore, Your Honor, this case, contrary to the posture in which Mr. O'NEILL attempts to place it, is not a settled case at all. After I filed the motion for Summary Judgment in this case, I got the documents. Notwithstanding the statements in the affidavit of Miss PETERS to all appearances, my receipt of the documents was precipitated by the filing to the complaints and I, and filing a motion for Summary Judgment.

It seems to me that if at any time prior to a court directing the Government to turn over documents after it has forced the plaintiff to go to Court to get those documents the Government can simply turn them over and avoid an award of costs or counsel fees, that at least is

the intent of Congress in enacting the strict time limitations in the Act and it defeats the intent of the Congress in addition to with respect to the provision of statutory attorneys fees, which is designed specifically to encourage people to go to Court to attempt to get those documents from the Government that is being recalcitrant or obdurate.

Another point in that connection, Your Honor, is that although the Government turned over the documents to me, claiming it had then completed its administrative process, it was under a statutory of ligation to do so; Section 552 A6, capital C of 5 United States Code requires the Government to continue with whatever process it is undertaking, even if a suit is filed and in fact gives the Government the opportunity to come to the Court and ask the Court to hold up action or on whatever complaint has been filed until they can complete that process.

One final point on that, Your Honor, and that is to respectfully direct your attention to the answer of the Government in this case. The only defenses available under the Freedom of Information Act are those stated in the exemptions. The Government's answer in this case doesn't mention one of the exceptions and the affidavits, the affidavit of Miss PETERS, excuse me, contains a letter written by a Department of Lator official to the Department of Justice, which admits error in claiming exemptions five, initially, in this case. Exemption 5 of course, being the exemptions for so-called intra-agency memorandum.

Now on the mootness question that the Government raised. Each and every case the Government cited on either mootness, settlement or offer of judgment is totally inapposite or pertinent, the new Freedom of Information Act, which contains a specific statutory authorization for counsel fees.

In the Information Act cases the Government cites, the Court says plaintiff was only seeking an injunction in this case in order to receive documents illegally withheld. That is not the case. V-L-I-A-C versus DUNLOP, plaintiff was seeking the documents, and by virtue of the statute an award of the attorney's fees and costs, and that is the reason we are before the Court today.

In particular, the case of MELLOW versus H-E-W, of which I've just received a copy from Mr. O'MEILL this morning—this afternoon, does not fit at all. The plaintiff in that case, had sued the Department of Health, Education, and Welfare, to be restored to a position, within one of the operating agencies of that department. She sought injunctive relief. At a point subsequent to administrative process in the case, when the agency had offered her that position, she moved for Summary Judgment in the Court.

In opposition, the Government produced a letter that she had sent to her supervisor at this particular agency in which she resigned her position. Plaintiff in the instant case never negotiated with the Government about getting these documents. The Government gave them to him.

The plaintiff did not precipitate any mootness in this case,

nor did he contribute to any settlements in the case.

Now, even if you considered this case as settlement, Second Circuit in JORDAN versus VISARRI 496 Federal Second 646.

THE COURT: Have you cited this anywhere?

MR. LIPSON: 496 Federal Second, 646, -- considered a request for counsel fees in a sex discrimination damage action, as I recollect. Maybe it was an injunction action, I'm sorry. After the action had been completely settled to the satisfaction of all parties out of court at the prodding of the District Judge, Second Circuit in that case examined the request for counsel fees, and it never occurred to it, I suppose, that the case could have been most at that point because it was settled. They went ahead in the case down in the District Court for proper computations.

New, there is another case I will cite the Court, too, which deals with the proposition that even if the Court were to dismiss this case for lack of jurisdiction under the circumstances, an award of counsel fees would be proper.

RESENFELD vs. SOUTHERN PACIFIC COMPANY, 519 Federal Second 527 Night Circuit 1976, the purposes underlining the Freedom of Information Act and its recent amendments make it clear that the attorney's fees should be awarded to public interest litigants absent exceptional circumstances. Congress' purpose was to prevent the situation that obtains

here where a citizen had to go to court to get documents from the Government.

Particularly instructive in this case is to see the exemption that the Government initially claimed, in order to deny the documents to plaintiff. That was exemption number five, Internal Memos.

I looked at a recent volume of the United States Code Annotated a recent paper, I'm sorry, advance sheet in the United States Annotated. Virtually every case after cited under the Freedom Information Act sections, involves a claim by the Government that this or that was an Internal Memo. Congress amended the Act in 1971 and again in 1974, and there have been legion cases dealing with what is an Internal Memo, the legion cases saying that the Government can not hide behind that exemption, and yet the Government continues to do it in case after case after case. Now, I wouldn't have minded if the Government had explained to me, in its initial denial of my request, how that exemption applied, which they were required to do so--required to do by their own regulations contained in 29 Code of Federal Regulation 70.49. But they did not do so. And in fact, in their affidavit, they admitted that they had made an error.

Finally, Your Honor, the affidavit of Miss PETERS which deals with, at length, with her duties as the person at the Department of Labor in charge of these requests and litigation and training and all of those things. There is

absolutely nothing more than rehash exactly the considerations that Congress considered and rejected in enacting specific strict statutory time limitations under the Act.

This is a most appropriate case for an award. The plaintiff in this case is a plaintiff who attempted to secure information from the Government, in pursuit of public interest goal; the Government's refusal in this case is typical of the Government's refusal and hundreds of other cases and that refusal has been rejected by the Courts in hundreds of other cases.

I'll go so far at to say in accordance with the considerations the Senate Committee stated that in determining whether attorney's fees should be awarded that there was no reasonable legal basis whatsoever for the Government's refusal in this case. And the Senate report says explicitly, Your Honor, and I have a copy of it with me which I will present to the Court, that only one of the four considerations they mentioned therein need be met before an award of counsel fees should be granted. There were no exeptional circumstances here.

If the Government cannot do its job, its duty is to return to Congress to ask Congress to amend the Act. Under the circumstances, Your Honor, I respectfully request that an award of counsel fees be made in accordance with the affidavi' that I submitted to the Court and costs, excuse me.

THE COURT: Well, isn't your request a little steep?

I realize that plenty of attorneys get probably thirty-five to forty dollars an hour, but the Criminal Justice Act . . .

MR. LIPSON: Your Honor, I can testify to whom I spoke regarding this matter and I did speak to approximately six counsel around the state most of whom had equivalent experience—six and a half years or seven years of experience.

And, there was some who mentioned figures in excess of that in Federal Court litigation; there were some who mentioned figures slightly lower than that. Your Honor, I believe to take judicial notice of the prevailing fees in this area that private practioners charge and there is no difference between the hours spent and their value in my case as there is in any other case of private practioners.

THE COURT: Well, I simply had in mind the provisions of the Criminal Justice Act which is cosiderally less in this and I have never had any attorneys complain about the fees in those cases: of course, those are all in the Federal Court.

MR. LIPSON: Your Honor has the discretion to award counsel fees but I would suggest that the Criminal Justice Act fee schedules is as low as it is simply because of the appropriations process in Congress rather than any recognition of what prevailing fees in a particular area are.

THE COURT: Mr. O'NEILL, we will hear from you.

MR. LIPSON: Excuse me Your Honor. May I present to the Court this . . .

THE COURT: Yes.

MR. LIPSON: . . . excerpt from the legislative history to the Court? (Excerpt handed to the Court.)

MR. O'NEILL: Your Honor, I won't attempt to speak as to the facts in any detail here in terms of the earlier proceedings with respect to the Department of Labor, rather rely basically upon the material within the file here upon the affidavits. The most basic reason for that is that I can't say, frankly, that this Office was involved in any proceedings prior to the time this action was filed in this Court. It's not part of our function. We rely, Your Honor quite frankly speaking. . .

THE COURT: We don't have any complaint against the way you respond, The United States Attorney's Office, handles these matters. I think it may have been better if you got into it earlier.

MR. O'NEILL: We might have, depending on which point of **view** with such things, Your Honor. Your Honor, my only point in saying that is that with respect to the individual facts surrounding Mr. LIPSON's problems, I think Labor might take a different view with respect to some of them.

Our view is basically this. The Department of Labor we act, certainly at their insistence in respect to matters of this nature, basically could have taken the position that this matter was not at all discoverable. Mr. LIPSON contends that they never have taken this position because he was entitled to it in the beginning. Had this matter

come before the Court, and the Court made a determination, this material should have been turned over, and there is no reason for it, we certainly could understand awarding counsel fees in that particular type of situation.

We are suggesting here, that the Department of Labor, and we believe on the basis of the appeals which have been taking place already, and not simply on the basis that this action having been filed, had realized the errors of its ways, itself, and in that point in time gone ahead and provided for the papers which were sought here. We believe that to grant counsel fees in this instance would not be a situation where the individual is, in fact, the prevailing party.

We believe that if Congress had intended counsel fees be awarded in this situation, they would have said in language to the effect of, if the information sought is substantially supplied after an action is filed, counsel fees should be allowed. We simply do not believe that they consider them to be the prevailing party with respect to this particular matter. Other than that, Your Honor, basically we rely upon where a memorandum with respect to this case was presented. Our basic position is that we feel to the extent that the Court determines the Government has been unreasonable withholding the documents or in its processes, then there is substantial matter before the Court to consider with respect to such fees and to the extent that Government had been reasonable, and we contend

that we have, we believe that the plaintiff is not entitled to recover counsel fees. We believe in any event, that they have to be a prevailing party, which they are not here.

I would raise, lastly, to some extent that the question the Court had with respect to the amount sent out on the affidavit. We do not believe the Court should reach that by any stretch of the imagination but I have some further question with respect as to not the number of hours spent, as I'm sure that the number of hours as indicated here are certainly correct, but the question we do raise is as to the figure itself. We raise the rather basic question to begin with whether or not the Freedom of Information Act was intended specifically as a boon. This is to say fees -- one recovers fees for the organization he works for, or if it was -- or in other words, if it was a penalty of sorts of the Government for his actual compensation. In an instance such as this, I am sure that Mr. LIPSON would agree with me that his salary didn't vary depending upon the amount of work you do with this. I am sure that he put in some more hours probably at night than he might have had to do otherwise. With respect to--we raise the question whether an organization such as his under these circumstances is entitled to recovery fees at all. We also raise the question of the thirty-five to forty dollars per hour figure. Again, I'm sure that the figure has been arrived at by consultation in the manner prescribed by Mr. LIPSON but we raise the question whether if the Court determines at all, that such fees are appropriate whether the determination should not in fact be made upon a calculation of the hourly rate which he is paid a salary together with the share of the administrative expenses there with his organization. In fact, the organization did not incur other than for any telephone calls which they had to make toll wise or for docking fees—this type of thing—trips down, this sort of thing. Any extra expenses per se is a salary—type of matter. We believe if the Court does come to the matter of counsel fees, then it should arrive at the calculation somewhere along the method that we have suggested here.

THE COURT: Well, do you take the position that the plaintiff hasn't substantially prevailed in this case?

MR. O'NEILL: We do, Your Honor.

MR. LIPSON: I'm sorry, I didn't hear that.

THE COURT: Well, why should a private citizen have to resort to the compulsory process of the Court to get compliance through an Act that is apparently, as plain as the nose on his face? If the Government agency takes the position, always that we are not going to give this information over until you make us.

MR. O'NEILL: Your Honor, I don't think that . . .

THE COURT: . . . and defeat the action by saying, alright now here you go--I don't see any reason why they should have to, a private citizen or a person who seeks to

obtain information under the Act should have to take recourse in that direction.

MR. O'NEILL: Your Honor, part of the difficulty with the situation that we find ourselves in here, and I think in a manner of speaking, the Court does, that unless the Court has some expertise which I am not familiar with, then there is no way for any of us here to know in what percentage of cases that the Department of Labor or other specific agencies turn over papers. I just simply don't know. I'm. sure that the percent has increased as time has gone along particularly with changes in the law and things of this nature. It's also, despite the claims from Mr. LIPSON with respect to this, not clear that the material here was forthcoming on the basis of the law suit brought. The paper apparently got lost in some point in time, perhaps they may have expedited it. I really, quite frankly can't say I know, Your Honor. I am not going to state categorically that the appeal process itself was moved along a little bit perhaps because the action was filed, frankly, because I don't know. The affidavits and information available would seem to suggest that the appellate process from the initial denial was going through its usual paces and that the filing of action not per se have the effect of causing the papers to be forthcoming. As I say, I can't honestly say that I know precisely myself. We have to ask the Court to rely on the information simply available to it. Appreciate the fact Mr. LIPSON is in a different position

with respect to the knowledge of the internal workings of the Government agency with the nature of cases of this sort doesn't make them worthwhile from anyone's perspective to the bringing people up for an award of counsel. We do suggest, Your Honor, that the material here was forthcoming because after initial determination that the material should not be and examination by persons who apparently have more expertise than those on the initial level, determine that it should be turned over, we believe, that it was.

We don't believe they are prevailing party within the meaning of the statute as we have indicated; we think that the Congress if they had desired or intended counsel fees be awarded in this situation should have provided specifically that the plaintiff in this situation will be described as a prevailing party, or they have substantially prevailed in the language of the statutes.

THE COURT: Anything further?

MR. LIPSON: I have one or two comments, Your Honor.

As Mr. O'NEILL points out that Congress did not say prevailing party who gets the documents when the Government decides to turn them over to them and the Congress said prevailing party. It is important to support and to see that the Government did not say prevailing party after judgment, after Summary Judgment, after ruling by the Court, or after indication by the Court that it would rule in the plaintiff's favor.

The Court recognizes that we did have to go to Court to get these documents and the statements of the Government regarding their administrative difficulties are, at best, self serving under these circumstances. With respect to the calculation of the fee amount, Your Honor, there are legion cases reported in which non-profit organizations have represented individuals, in connection with action brought on the statute which provide for counsel fees and I have read a number of them, probably not all of them, and I have never seen a case in which the fee was calculated so far as the Court said on the basis of what the Government or what the non-profit organizations salary was. It seems to me there is a serious question here as to whether the Government ought to get away cheap or when it's a non-profit organization pursuing it; retaining counsel from Washington, D.C. for instance, who might bill as high as \$90 or \$150 an hour for litigation of this nature.

Insofar as Government compliance with the Information Act is concerned, one needs only to go to the main and pocket parts of any statutes annotated volume to see that there have been thousands of cases, in which the Government has been compelled to go to court and those are just court cases. We don't know Mr. O'NEILL is correct what precipitated the Government turning over the documents to us but I will suggest to the Court, that I would still be waiting for them but for the law suit being filed and I did wait for them, in fact, four months after I made the initial

request which is far beyond any of the time limitations including the extentions of time were permitted by the . . .

THE COURT: Well, the Government ought to have some credit for having turned over the material without and I. . .

MR. LIPSON: I do.

THE COURT: . . . don't want to be in the position, I don't think the Court should be in the position where, saying if you voluntarily surrender these things, you are going to be the party that did not prevail, so to have voluntary action delayed or at least put in the posture where there is considerable concern as to whether or not they should comply.

MR. LIPSON: I have one other submission to the Court on a question of fee, Your Honor, and this was a case in which former associates of mine in Washington, D.C. were involved, they are a Ford Foundation funded, Public Interest law firm, and in this case they represented the National Wildlife Federation in a Freedom of Information Act case before the United States District Court for the District of Columbia. What I have is an order in which the Honorable WILLIAM BRYANT awarded attorney's fees to that organization.

THE COURT: All right. (Handed to the Court.)

MR. LIPSON: Just an indication of the level of the fees that are available in these cases.

THE COURT: The Court will recess until, i believe it is 1:30--11:00 on Monday morning, March 1st.

## CERTIFICATE

This is to certify that I, Herman J. Vesper, Official Court Reporter, United States District Court, For the District of Vermont, have herein within the foregoing pages, completely and accurately transcribed my verbatim stenographic notes of the hearing in the case of VERMONT LOW INCOME ADVOCACY COUNCIL, INC., versus JOHN DUNLOP, et al., Civil Action Number 75-247, which was heard before The Honorable JAMES S. HOLDEN, U.S. District Judge, For the District of Vermont, at Rutland, Vermont, on 27 February 1976.

s/Herman J. Vesper

Official Court Reporter

(Mr.) Herman J. Vesper P.O. Box 143 Rutland, Vermont 05701

### UNITED STATES DISTRICT COURT

FOR THE

#### DISTRICT OF VERMONT

CIVIL ACTION FILE NO. 75-247

Vermont Low Income Advocacy Council, Inc.	
. vs.	JUDGMENT
John Dunlop, in his official capacity as ) Secretary, United States Department of ) Labor )	

This action came on for trial (hearing) before the Court, Honorable James S. Holden, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Plaintiff's motion for an award of attorney's fees and costs is denied; and the action is dismissed.

Dated at Burlington, Vermont , this 1st day of April,

1976.

s/Edward J. Trudell Clerk of Court

## MEMORANDUM AND ORDER

The question presented to the court is the plaintiff's motion for an award of costs and attorney's fees in this proceeding under the Freedom of Information Act. (FOIA). Initially the Secretary denied the plaintiff's request for disclosure of certain records of the Department of Labor. Shortlyafter the suit was filed the Secretary supplied the plaintiff with a substantial amount of the information sought. The only issue remaining in the action is the propriety of an award of costs and counsel fees under 5 U.S.C. § 552(a)(4) (Supp. IV, 1974).

Plaintiff is a non-profit Vermont corporation organized for the purpose of advocating the rights of low-income, unemployed and underemployed Vermont residents. During 1974 and 1975 the plaintiff was active in attempting to persuade the defendant that certification of foreign labor to pick the Vermont apple crop was unnecessary, since it deprived local workers of need job opportunities.

On August 28, 1975, the plaintiff requested "all records, reports or documents prepared by the Department of Labor in connection with on-site evaluations of all Vermont apple growers' efforts to recruit domestic labor to pick the 1975 apple harvest prepared at any time during the period May-July, 1975." The request was denied by the defendant's letter dated September 8, 1975, on the ground that the requested material was exempt "intra-agency memoranda" within 5 U.S.C. § 552(b)(5) (Supp. IV 1974). The denial was not accompanied by any explanation concerning how the exemption claimed applied to the material withheld, as required by 29 C.F.R.

§ 70.49. On September 16, 1975, the plaintiff appealed from the denial. The letter was acknowledged by the office of the Solicitor on October 2, 1975. The communication advised the plaintiff that before a determination could be made, it was necessary to obtain the record from the Regional Office and a reply would be mailed on or before October 22, 1975. On October 30 the plaintiff's attorney inquired of the status of the appeal and advised the defendant that suit would be commenced to compel the production of the requested information unless it was received by November 6, 1975.

By telegram transmitted on November 6 the Solicitor informed plaintiff's attorney that the file had not been received from the Regional Office. The telegram requested plaintiff's counsel to provide his telephone number where he could be reached in order that the Solicitor's office could discuss the problem. Because the Boston office erroneously transmitted the records for September-October, 1975, the correct records for the May-July period were not received by the Solicitor until December 9, 1975.

In the interim the statutory time for administrative action expired; the plaintiff instituted the present action on November 12, 1975, seeking preliminary and permanent injunctive relief to compel produce in of the records. On or about December 16, 1975, the plaintiff interney was notified by telephone that the Solicitor would grant the appeal. On December 17, 1975, the plaintiff moved for summary judgment. Before the motion was set for hearing the defendant supplied the records requested with some deletions which the Solicitor considered justified on the ground that disclosure would constitute "a clearly unwarranted invasion of the

personal privacy of certain employees." On January 12, 1976, the plaintiff informed the clerk of the court that since it had received the information demanded of the defendant, the motion for summary judgment was withdrawn. The notice was accompanied by the present motion for counsel fees and costs.

In passing on the plaintiff's motion, we must first consider whether an award of costs and attorney's fees is appropriate in this particular case; if so, in what amount. The statutory provision governing attorney's fees and costs in FOIA actions provides:

The court may assess against the Ukited States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

5 U.S.C. § 552(a)(4)(E)(Supp. IV 1974). Since the statute has only been in effect since November 21, 1974, there have teen limited occasions for judicial construction.

The House of Representatives and the Senate, following conflicting votes on the 1974 amendments to the FOIA, recommended in joint conference that a compremise be struck between the House and Senate Bills regarding counsel fees in FOIA cases:

The House bill provided that a Federal court may, in its discretion, assess reasonable attorney fees and other litigation costs reasonably incurred by the complainant in Freedom of Information cases in which the Federal Government had not prevailed.

The Senate amendment also contained a similar provision applying to cases in which the complainant had "substantially prevailed," but added certain criteria for consideration by the court in making such awards, including the benefit to the public deriving from the case, the commercial benefit to the complainant and the nature of his interest in the Federal records sought, and whether the Government's withholding of the records sought had "a reasonable basis in law."

The conference substitute follows the Scnate amendment, except that the statutory criteria for court award of attorney fees and litigation costs were eliminated. By eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Instead, the conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary.

1974 U.S. Code Cong. & Admin. News, 93d Cong. 2d Sess. 6267, 6288.

Both the earlier House and Senate Committee Reports indicated the congressional understanding that the allowance of attorney's fees in FOIA cases would be desirable in advancing the important policy considerations underlying the FOIA. See S. Rep. 93-584, 93d Cong., 2d Sess. (March 16, 1974), and H. Rep. 93-876, 93d Cong. 2d Sess. (March 5, 1974) (reprinted at 1974 U.S. Code Cong. & Admin. News 6267).

In support of its claim for an award, the plaintiff places principal reliance on two decisions of the Supreme Court in the area of racial discrimination litigation. In Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), the Court held that the counsel fee provisions of Title II of the Civil Rights Act of 1964, 2/42 U.S.C. § 2000a-3(b), should be applied so that "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust." 390 U.S. at 402. Confronted with the same question, but this time in the context of the counsel fee provision of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, the Court in Northcross v. Board of Education, 412 U.S. 427 (1973)

applied the <u>Newman</u> standard in granting attorney's fees under the Act. The Court's rationale for its liberal reading of these statutes is that the award of counsel fees encourages private enforcement of the Acts, and private enforcement vindicates the policy underlying the Acts, the elimination of racial discrimination.

<u>Compare Alyeska Pipeline Service Co. v. Wilderness Society</u>, 421

U.S. 240 (1975).

It is noteworthy that in both <u>Newman</u> and <u>Northcross</u> the claimants had successfully prosecuted their actions for injunctive relief. In the instant case the defendant has voluntarily relinquished the material which was the object of the litigation. Here the court's jurisdiction under the Act has been invoked, but never exercised.

The assessment of counsel fees and costs under 5 U.S.C. § 552(a)(4)(E) is available in the court's discretion to a complainant who has 'substantially prevailed.' In differing contexts a prevailing party is generally held to be "the party in whose favor judgment is rendered . . . " Mobile Power Enterprises, Inc. v. Power-Vac, Inc., 496 F.2d 1311, 1312 (10th Cir. 1974). And an election to favorably settle an action does not transform a compromising litigant into a prevailing party. Id. To hold otherwise would tend to discourage voluntary compliance after judicial review is undertaken. Such a course would work against the policy of the Act.

Here the plaintiff asserted its complaint in proper administrative proceedings. In the first instance the information was withheld on what may have been an erroneous interpretation of the

recent statute. On appeal the administrative decision was delayed until the correct requested material could be retrieved from the Regional office. While the delay generated the present litigation, as soon as the defendant discovered the plaintiff was lawfully entitled to a part of the records, the appropriate material was supplied. Certain material was withheld, apparently with some legal justification. In any event, there is nothing this court has done to grant the plaintiff the relief prayed for in the complaint. There has been no judicial action to establish the plaintiff as the prevailing party. The plaintiff's motion for an award of attorney's fees and costs will be denied and the action dismissed. See Mello v. Secretary of Health, Education and Welfare, 8 EED 9 9620, p. 56-57 (D.D.C. 1974). The Clerk will enter an order accordingly.

SO ORDERED.

Dated at Rutland, in the District of Vermont, this 30th day of March, 1976.

> s/James S. Holden James S. Holden Chief Judge

## Footnotes

1/Pub. L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 476 codified as 5 U.S.C. § 552 (Supp. IV 1974).

2/The attorney's fees provision of the Civil Rights Act of 1964 is worded substantially the same as its FOIA analog:

In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

## NOTICE OF APPEAL

Notice is hereby given that the Vermont Low Income Advocacy Council, Inc., plaintiff in the above-captioned action, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment order entered on April 1, 1976, denying plaintiff's motion for an award of attorney's fees and costs and the dismissing the action.

DATED: Apeil 30, 1976

s/Michael H. Lipson
MICHAEL H. LIPSON
Vermont Legal Aid, Inc.
P.O. Box 562
Burlington, Vermont

ATTORNEY FOR PLAINTIFFS

## CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded the foregoing NOTICE OF APPEAL to Jerome F. O'Neill, Assistant United States Attorney, Federal Building, Rutland, Vermont 05701, by mailing, postage prepaid to said address.

> s/Michael H. Lipson MICHAEL H. LIPSON Vermont Legal Aid, Inc.

# 5 U.S.C. § 552(a)(4)(E):

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.